No. 17437

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JESSE A. S. LEWIS, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of California Northern Division

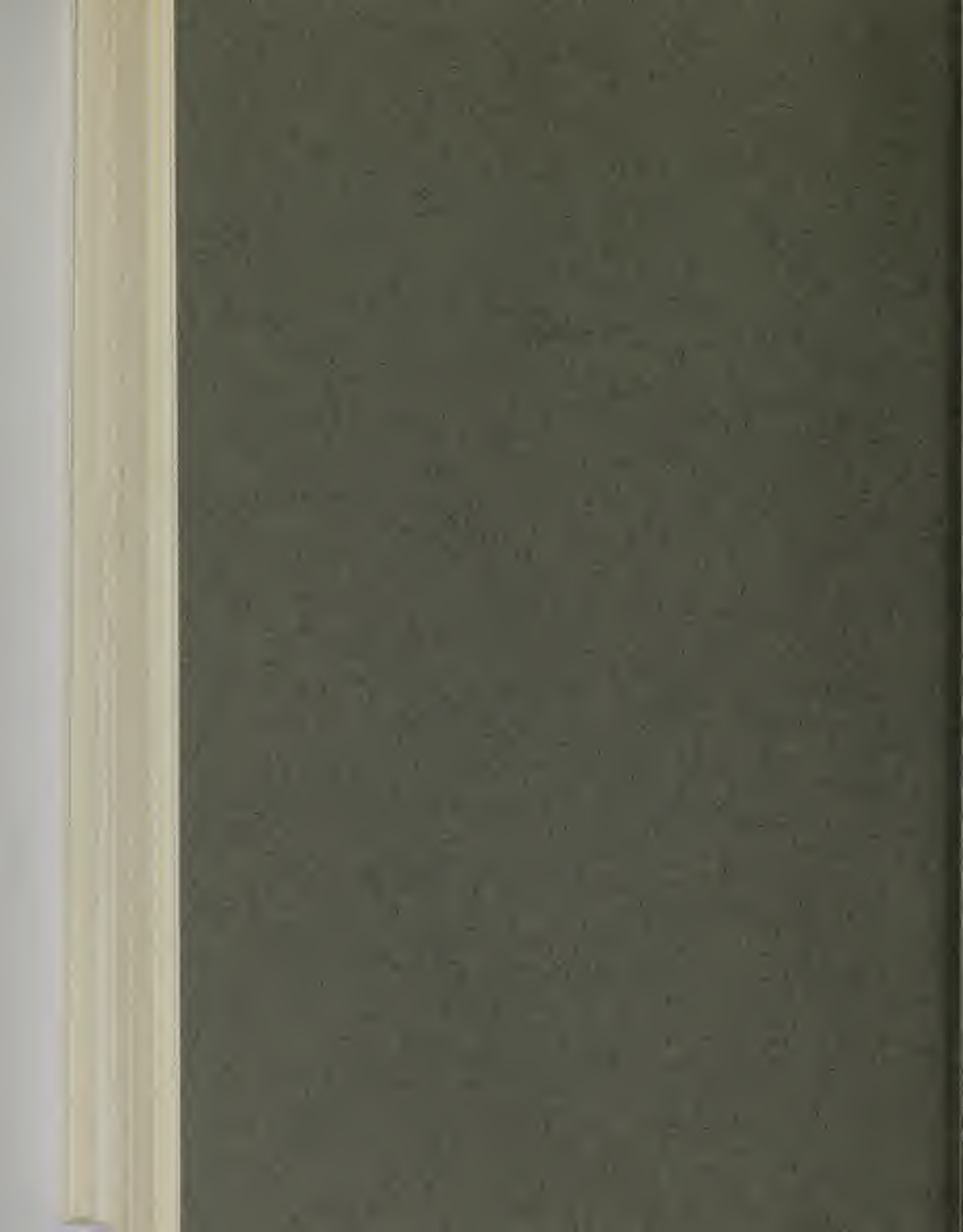
REPLY BRIEF FOR THE UNITED STATES, APPELLANT

RAMSEY CLARK,
Assistant Attorney General.

FRANCIS C. WHELAN,
United States Attorney,
Los Angeles 12, California.

RICHARD J. DAUBER,
Assistant United States Attorney,
Los Angeles 12, California.

ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington 25, D. C.



INDEX

CITATIONS

Cases:

Cases—Continued Page

Statutes and Rules:

In the United States Court of Appeals for the Ninth Circuit

No. 17437

UNITED STATES OF AMERICA, APPELLANT

v.

JESSE A. S. LEWIS, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of California Northern Division

---

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

For the convenience of the Court, we will follow the same points made in our opening brief to show that no substantial response has been made to the arguments advanced by the United States.

I

A Commission Appointed Under Rule 71A(h), F.R.Civ.P., Is Required to File a Report Containing Detailed Findings Showing How Its Award Was Reached

We submit that the issue before the district court reviewing a commission under the "clearly erroneous"

provision of Rule 53(e)(II), F.R.Civ.P., is the same as the issue that would be before this Court reviewing the district court under Rule 52(a), F.R.Civ.P. Assuming that a trial judge had filed the same findings as did the commission here, would this Court say that the findings were adequate? Would this Court in such a case be able to determine on what basis the district court arrived at the award? In our view, the same criterion and the same limitations that apply to this Court's review of the district court should control the district court in the instant case. Even as to special masters, where a broader discretion exists in the district court as to what issues may be submitted to the master, and where there is some ground for saying that the master is an assistant judge, the courts have generally held that the district court is in the same position as the appellate court so far as the binding effect of the master's findings are concerned.[1] *Michelsen* v. *Penny*, 135 F.2d 409 (C.A.

---

[1] There is a very important difference between the nature of Rule 71A(h) commissioners and special masters appointed under Rule 53 which is reflected in the approach that is taken upon review of their results. Masters are only appointed when, because of some exceptional circumstance, the judge does not determine the matter himself. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). And as *LaBuy* puts it (p. 256), "The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' *Ex Parte Peterson*, 253 U.S. 300, 312 (1920), and not to displace the court." Since this is a question of the judge appointing an assistant, Rule 53 provides that, in addition to discretion as to when a master shall be employed, the court in its order "may specify or limit his powers and may direct him to report only upon particular issues or to do or perform

2, 1943); *Republic National Bank of Dallas* v. *Vial*, 232 F.2d 785 (C.A. 5, 1956); *Leader Clothing Co.* v. *Fidelity & Casualty Co. of N. Y.*, 237 F.2d 7 (C.A. 10, 1956). In *Pallma* v. *Fox*, 182 F.2d 895 (C.A. 2, 1950), Judge Learned Hand said (p. 900), "We do not forget what we have so often said, and what indeed Rule 53(e)(2), F.R.Civ.P., 28 U.S.C. makes peremptory; i.e., that a master's findings are as conclusive upon the district court as that court's findings are conclusive upon us."

The Fourth and Fifth Circuit Courts have indicated a much broader authority of the district court in reviewing commissioners than the "clearly erroneous" standard as applicable to courts of appeals, and have ruled that the determination of value is a determination of the court and not of the commission. They have said that Rule 71A(h) is merely a guide to be

---

particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report." Thus it has been said that "the Report of the master is advisory only." *D. M. W. Contracting Co.* v. *Stolz*, 158 F.2d 405 (C.A.D.C. 1946), cert. den. 330 U.S. 839.

Under Rule 71A(h) F.R.Civ.P., a choice, when a jury has been demanded, is not between commissioners and a court trial, but between jury trial and commissioners, and Rule 71A(h) itself, not the court, determines the scope of the respective powers and duties of the court and commissioners. Only some particular provisions of Rule 53(e), primarily those of a procedural nature, are made applicable to Rule 71A(h) commissioners. Also, since Rule 71A(h) commissioners are the parallel and the substitute for the jury to which the parties are generally entitled, the facts they have found should receive the same respect by the court.

followed in the exercise of discretion vested in the district judge, and not a limitation upon his power. *United States* v. *Twin City Power Company*, 248 F. 2d 108 (C.A. 4, 1957), cert. den. 356 U.S. 918; *United States* v. *Twin City Power Company of Georgia*, 253 F.2d 197 (C.A. 5, 1958); *United States* v. *Certain Interests in Property, Etc.*, 296 F.2d 264 (C.A. 4, 1961). While we think that rule is wrong, certiorari was not sought in the last-cited case because of deficiencies in the record.

Appellees contend that the findings of the commission in this case are in compliance with the court's direction to file a report "setting forth their conclusions as to the just compensation" and that no further findings are required of the commission. Such a report is the kind that has been rejected by the Fourth and Fifth Circuits, as shown in the Government's opening brief (pp. 12-14). The cases relied upon by appellees (Br. 8-10) do not sustain their contention, as we shall show:

We submit that the opinions in *United States* v. *Buhler*, 254 F.2d 876 (C.A. 5, 1958), and *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), amply demonstrate the mistake in appellees' reliance upon the district courts' opinions in those cases which were reversed (Br. 10).

Baetjer v. *United States*, 143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772, was decided prior to the enactment of Rule 71A(h), F.R.Civ.P. The court pointed out that the Federal Rules of Civil Procedure

did not apply to condemnation cases except on appeal. Hence, the requirement of Rule 52(a) when actions are tried upon the facts without a jury, that "the court shall find the facts specifically and state separately its conclusions of law thereon," was not applicable. Indeed, the *Baetjer* case supports our position here, because there is the clear implication that detailed findings would have been required had Rule 52(a) been applicable.

United States v. *Pendergrast*, 241 F.2d 687 (C.A. 4, 1957), was an action for damages under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b). That this case has no applicability to the present case is shown by the statement in *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), at page 333, footnote: "The case is very different from United States v. Pendergrast, 241 F.2d 687, where the issues were simple and we held that the decision below could be reviewed as well without findings as with them."

Carpenter, Babson & Fendler v. *Condor Pictures, Inc.*, 110 F.2d 317 (C.A. 9, 1940), was not a condemnation proceeding. It was a bankruptcy case and the order of reference "clearly indicated that the special master was not to make findings, but that the trial court would decide the facts." The order of reference to the commission in the present case contained no such instruction, and the district court had, we believe, no power under Rule 71A(h) to undertake to decide the case for itself on the findings before the commission. Rules 71A(h) and 53(e)(II) require the commission to make a report as well as findings.

Rule 71A(h) adopted only specific portions of Rule 53 relating to masters to establish the procedures to be followed, the powers of subpoena, and the like. Thus, rather than permitting the district court to control or limit the commissioners' functions, Rule 71A(h) itself provides that, when commissioners are employed, "the issue of compensation shall be determined * * * by the commission." Reference is made to Rule 53(c) only to give the commission "the powers of a master." The other provisions adopt other designated parts of Rule 53 for procedural purposes including the "clearly erroneous" standard of review by the district court.

Rule 71A(h) speaks of the "findings and report," not merely the report. This is an important difference. Report is the total document including the ultimate award. In exercising its power to correct errors of law, the district court may well be called upon to modify the report, for example, by excluding noncompensable items for which separate awards have been made.

In *United States* v. *2,477.79 Acres of Land in Bell County*, 259 F.2d 23, 29 (C.A. 5, 1958), the court specifically pointed out that the findings should show how the commissioners resolved the conflicts in the testimony. As shown in the Government's opening brief (p. 17), there were many conflicts in the evidence which the commission failed to show how they resolved, and no findings as to very material evidentiary facts which should have been made. Here again, the question is appropriate, would this Court, reviewing a valuation by a district court under Rule

52(a), F.R.Civ.P.,[2] consider adequate the report that has here been filed? In *Kweskin* v. *Finkelstein*, 223 F.2d 677 (C.A. 7, 1955), the judgment was reversed and the case remanded for "specific findings with reference to the material issues in the case." The court stated that a fair compliance with Rule 52(a), F.R.Civ.P., is mandatory, and findings of fact on every material issue are a statutory requirement. It stated further that "there must be such subsidiary findings of fact as will support the ultimate conclusion by the court. Kelley et al. v. Everglades Drainage District, 319 U.S. 415, 420, 422." Both because of the requirements of Rule 71A(h) and because of the failure of that rule to authorize the district court to control the functions of the commission, cases such as *Carpenter, Babson & Fendler* v. *Condor Pictures, Inc.*, 110 F.2d 317 (C.A. 9, 1940), where the trial court indicated that a referee was not to make findings, do not support the judgment here.

II

The Chairman and Another Commissioner Erred in Not Disqualifying Themselves from Hearing This Case Because of Their Association With Two Expert Witnesses for the Landowners

Appellees have made no direct answer to this point of the Government's brief. They state, without supporting authority, that the prior association of two

---

[2] Since Rule 71A(a) provides that the other rules govern the procedure in federal condemnation cases "except as otherwise provided in this rule," Rule 52(a) now applies as to judge-tried condemnation cases.

of the commissioners with two of their witnesses would not be a basis for a challenge for cause on the part of a prospective juryman (Br. 12). As shown in our opening brief (p. 22), the Tenth Circuit reversed the judgment in *United States* v. *Chapman*, 158 F.2d 417, 419 (1947), because the district court refused to sustain the Government's challenge to a prospective juror who was an acquaintance of the Chapmans. "The great trend of modern authority is to exclude from juries all persons who by reason of their business or social relations, past or present, with either of the parties, could be suspected of possible bias, even though the particular status or relation is not enumerated in the statutes declaring the qualifications of jurors and the grounds of challenge." Jury, 31 Am. Jur. sec. 199; *Sherman* v. *Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 418 (1910). In *Boothe* v. *Baltimore Steam Packet Company*, 149 F.Supp. 861 (E.D. Va. 1957), the defendant requested a change of venue because the plaintiff was the mother of one of counsel in the case whose popularity in the area was generally recognized. The court stated that "these difficulties may be overcome by directing the presence of a full venire and permitting the interrogation of all prospective jurors as to their relationships, associations, and business dealings, if any, with plaintiff, her son, and his law firm."

Since the commission's award was approximately double the valuations of the Government's witnesses, the effect on the ultimate conclusion resulting from the prior association of the experts with two of the

commissioners cannot be dismissed as fanciful. We repeat the applicable statement of the Tenth Circuit in the *Chapman* case (p. 421), that "The suspicions of the Government may be more fanciful than real, but we are convinced that they are not wholly without foundation, and that, in our judgment, is sufficient."

The only other response of appellees is that it would be difficult to find an unbiased commission in Tulare County. If this factual premise is true, it does not, we submit, warrant affirmance of an award by a disqualified commission. If anything, it indicates the wisdom of the provision of the Tennessee Valley Authority Act, 16 U.S.C. sec. 831x, providing "and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies." As we have pointed out in our opening brief, the *Chapman* case is not to be answered by the bootstrapping assertion of the commissioners that their prior associations with the witnesses would not influence their award (Br. 11-12).

III

The Valuation by the Appellees' Appraiser Arrived at by Adding to the Agricultural Damage to the Entire Unit a Value for the Gravel Deposit Was Erroneous

This point in the Government's opening brief involved, first, the discrepancy of $42,000 in the valuation of the property by George A. Murphy, appellees' appraiser, based on the carrying capacity of the two parcels of land owned by appellees, before and af'e-

the taking, and second, the error in adding to the agricultural value the estimated value of the gravel on the parcel taken (pp. 26-32).

Appellees have argued that the valuation of ranches according to the carrying capacity of animal units is an accepted method of valuation (Br. 13-14). There is nothing in the Government's brief to the contrary and that is not the issue on this appeal. The quotation in the Government's brief (p. 27) from Murphy's testimony is not for the purpose of criticizing the method of valuation, i.e., the carrying capacity of animal units, but it is for the purpose of showing that he made an error of $42,000, for which he gave no explanation, which error, standing alone, was sufficient to vitiate the award based upon his valuation. Appellees do not attempt to make an explanation, but simply evade the question by stating that the Government "has lifted a few lines" of Murphy's testimony and "drawn a completely unwarranted conclusion from it" (Br. 13). The quotation speaks for itself, and clearly shows that Murphy's valuation was grossly incorrect.

Appellees also have distorted the Government's argument in regard to the gravel deposit. As shown by the two cases relied upon, *Georgia Kaolin Co.* v. *United States*, 214 F.2d 284 (C.A. 5, 1954), cert. den. 348 U.S. 914, and *United States* v. *Land in Dry Bed of Rosamond Lake, Cal.*, 143 F.Supp. 314 (S.D. Cal. 1956), such deposits should be given weight, but should not be considered apart from other proper elements of value. They are "simply one of the many elements that went to make up the value of the lands."

The Government's appraisers did not add any increment of value to the property taken by reason of the gravel deposit, as there was no lease on the property and no aggregate was being removed (R. 395-403, 528-530). And furthermore, the Government's witness, who was a geologist and metallurgical engineer, testified that his study of the area showed that practically all of the property in the Tule River basin had rock and gravel characteristics (R. 272-303). If they had considered that the market value of the property would have been enhanced because of the gravel deposit located therein, their valuations would have been based on what similar properties containing like deposits had been sold for in the vicinity, within a period not too remote from the date of taking, and not by estimating the amount of the deposit and multiplying it by the amount at which it might sell after removal. *United States* v. *5 Acres of Land, in Suffolk County, New York,* 50 F.Supp. 69, 71 (E.D. N.Y. 1943).

The cases relied upon by appellees (Br. 15-16) do not support their method of valuation of multiplying the number of tons of gravel by the price at which it might be sold after it is removed, and then added to the separate value of the land for other purposes. Although the court stated in *National Brick Co.* v. *United States,* 131 F.2d 30, 32 (C.A. D.C. 1942), that "the jury should have been informed by competent witnesses as to the quantity of the sand, the quality of the sand, the uses to which it might be put, whether there was a market for it," it added, "and the *value of the land with the sand in that market in*

its then condition." [Emphasis added.] The court specifically pointed out (p. 31) that "counsel for appellant was not seeking to prove the profit derived from the sale of the sand, or the value or price of the sand after it had been taken out of the bank" as was done in the present case by the witness Murphy (R. 219-221, 237-245). The fallacy of Murphy's method of valuation is appropriately stated in *United States* v. *Indian Creek Marble Co.*, 40 F.Supp. 811 (E.D. Tenn. 1941), where the experts for the landowner did exactly the thing that was done in this case, as follows (p. 822):

> Fixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts. This is true because such valuation involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the conduct of a manufacturing enterprise. It eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It

> would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted. To the extent the valuation fixed by any witness contains this speculative element, to the same extent is its value as evidence reduced.

The *National Brick Co.* case was considered in *United States* v. *70.39 Acres of Land*, 164 F.Supp. 451 (S.D. Cal. 1958), affirmed *sub nom. Carlstrom* v. *United States*, 275 F.2d 802 (C.A. 9, 1960), where the district court stated (p. 489):

> * * * We are in disagreement with the cases from the Eighth and Fourth Circuits, which permit minerals, timber, buildings, etc., to be valued separately from the land. Clark v. United States, 8 Cir., 1946, 155 F.2d 157, 160; Cade v. United States, 4 Cir., 1954, 213 F.2d 138, 141; United States v. 5139.5 Acres, etc., 4 Cir., 1952, 200 F.2d 659, 661. And in disagreement with National Brick Co. v. United States, 1942, 76 U.S. App.D.C. 329, 131 F.2d 30, if it be so interpreted.
>
> The better rule, to the contrary, is found in the Fifth, Sixth and Seventh Circuits, Georgia Kaolin Co. v. United States, 5 Cir., 1954, 214

> F.2d 284, 286; United States v. Meyer, 7 Cir., 1940, 113 F.2d 387; Morton Butler Timber Co. v. United States, 6 Cir., 1937, 91 F.2d 884, 887-888. You cannot separately value land and buildings for appraisal purposes in a condemnation suit. * * *

In a recent decision of the Second Circuit,[3] concerning claimed gravel value, that court adopted precisely this same rule, stating:

> Appellant rightly contends that if the condemned land contains a mineral deposit, such as gravel, it is proper to consider this fact in determining the market value of the land as a whole, but it is not permissible to determine separately the value of the mineral deposit and add this to the value of the land as a unit. The instructions on the retrial should recognize this principle.

In a footnote, the court cited: *United States* v. *Cunningham*, 246 F.2d 330, 333 (C.A. 4, 1957); *United States* v. *Meyer*, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States* v. *Rayno*, 136 F.2d 376, 380 (C.A. 1, 1943), cert. den. 320 U.S. 776; *United States* v. *Glanat Realty Corp.*, 276 F.2d 264, 265 (C.A. 2, 1960). And, we submit, it is highly important in commissioner tried cases that their report show to what extent and in what manner they treated the claimed gravel value. That was precisely one of the points in *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), which,

---

[3] *United States* v. *158.76 Acres of Land, in the Town of Townshend, Windham County, Vermont*, decided January 19, 1962. Copies of this unreported opinion are submitted herewith, and copies have been served on opposing counsel.

speaking, *inter alia*, of a claimed mineral value, declares (p. 333): "It would not be proper, however, to attempt to arrive at value by adding these elements of value together." [4]

The other cases relied upon by appellees (Br. 15-16) do not support their method of valuation, but simply stand for the general principle that in determining fair market value of property, "the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future, is to be considered; but elements affecting value that depend upon events, which while possible are not fairly shown to be reasonably probable, should be excluded." *Cameron Development Co.* v. *United States*, 145 F.2d 209, 210 (C.A. 5, 1944). Where there are deposits of aggregate in the land, it is to be considered, not separately as was done in the present case, but by considering "what similar properties containing like deposits of" such aggregate sold for in the vicinity within a period not too remote from the date of taking. *United States* v. *5 Acres of Land in Suffolk County, New York*, 50 F.Supp. 69 (E.D. N.Y. 1943). This is one of the cases relied upon by appellees (Br. 16), and clearly does not support their position.

Appellees make the fallacious contention that the Government has not objected to the amount of the award rendered by the commission, and unless the award of the commission is clearly erroneous it should

---

[4] This decision indicates that earlier Fourth Circuit decisions should not be taken as authorizing valuation of minerals, timber, etc., separately from the land.

be accepted by this Court (Br. 18). The entire third point of the Government's opening brief (pp. 26-32) points out the errors of the appellees' valuation and the commission's award based thereon. The last paragraph points out that the award is based partially on the added value for the gravel and, since that testimony was inadmissible, "the finding is clearly erroneous, and the award should not be allowed to stand." It was also pointed out (pp. 27-28), that the witness Murphy's valuation of the land based on the carrying capacity of animal units contained a discrepancy of $42,000, which was sufficient error to vitiate the award based upon his valuation.

An exception to the commissioners' award merely on the ground of excessiveness would have presented nothing to the district court, just as a similar exception to a district court's findings would present nothing to this Court. In either case, it is not the function of the reviewers to reweigh the evidence and to either modify or reverse the award simply because it concludes the result to exceed or be less than fair market value. Cf. *Stephens* v. *United States*, 235 F.2d 467, 471 (C.A. 5, 1956).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment should be reversed.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

FRANCIS C. WHELAN,
United States Attorney,
Los Angeles 12, Cal.

RICHARD J. DAUBER,
Assistant United States Attorney,
Los Angeles 12, Cal.

ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington 25, D. C.

FEBRUARY 1962

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 629708 975